CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION

IN THE MATTERS OF:	)	**DEFENDANTS' CLOSING BRIEF**
	)	
	)	
MR. JOHN K. JUSTICE	)	**[Complaint Nos. R8-0064 &**
1669 SHAY ROAD	)	**R8-0065 for Administrative**
BIG BEAR CITY, CA 92314	)	**Civil Liability]**
	)	
MR. RON TAYLOR	)	
1659 SHAY ROAD	)	
BIG BEAR CITY, CA 92314	)	

CLOSING BRIEF

I. INTRODUCTION.

Substantial evidence presented at the September 6, 2002 hearing showed that John Justice and Ron Taylor were exempt from the Santa Ana River Basin Waste Discharge Prohibitions because permits for their septic systems were issued by the County of San Bernardino, and the systems were constructed, prior to the effective date of the prohibitions. Therefore, Cease and Desist Order No. 00-83, upon which the Board's Complaint against Mr. Taylor and Mr. Justice is based, should never have been issued. Moreover, and perhaps more significantly, the hydrogeologic evidence presented at the hearing demonstrates that factual predicates to the Cease and Desist Order (that the leaching or percolation of waste from the systems has resulted, or may in the future result, in a pollution or nuisance or otherwise affect water quality) were faulty. In light of this evidence, as well as the violations of procedural due process that occurred at the hearing, it would be improper for the Board to impose administrative civil liability.

II. BACKGROUND FACTS ESTABLISH DATE WHEN SUBJECT DISPOSAL SYSTEMS WERE INSTALLED.

Mr. Justice and Mr. Taylor own property in Big Bear City, California. Their properties are located off of Shay Road, near the southeast shore of Baldwin Lake. Prior to constructing residences on the parcels, permits allowing leach line septic systems were issued by the County. The forgoing facts are in the Board staff's report and are not disputed. The permit for the Taylor property was issued on June 10, 1975. (See Exhibit B-1 to Ron Taylor's Letter to the Board Chair, dated 9/6/02 ["Taylor Letter"].) The permit for the Justice property was issued on August 8, 1979. (See Exhibit A-1 to John Justice's Letter to the Board Chair, dated 9/6/02 ["Justice Letter"].)

III. THE PROCEDURAL HISTORY ESTABLISHES ATTEMPTS TO COMPLY WITH THE CEASE AND DECIST ORDER

On October 6, 2000, the Board adopted and issued Cease and Desist Order No. 00-83. The Cease and Desist Order sought to require Mr. Justice and Mr. Taylor to comply with the Regional Board's Bear Valley Subsurface Waste Discharge Prohibition by October 6, 2001. In effect, it attempted to require the two landowners to hook up to the Big Bear City Community Service District ("BBCCSD") sewer at a significant cost.

Following the issuance of the Cease and Desist Order, and in an attempt to comply with the CDO, Mr. Justice and Mr. Taylor engaged the services of the environmental and geotechincal consulting firm Geo Sec. Geo Sec performed soils testing near the leach fields on both of the properties, which showed there was no evidence of a waste discharge to the waters of the State. In letters dated September 18, 2001 and November 16, 2001, the Board notified Mr. Justice and Taylor that the new evidence did not satisfy the compliance requirements set forth in the Cease and Desist Order.

On December 7, 2001, Mr. Justice and Mr. Taylor filed a Petition with the State Water Resources Control Board ("SWRCB") seeking, *inter alia*, review of the Cease and Desist Order. On December 20, 2001, they received correspondence from the SWRCB stating that the Petition was premature. According to the letter, their Petition would not be ripe until the Regional Board issued an Administrative Civil Liability Order or took other enforcement action.

On August 2, 2002, the Petitioners received correspondence from the Board stating they had failed to comply with the Cease and Desist Order in violation of provisions of the California Water Code. The correspondence enclosed the Complaint for Administrative Civil Liability, which gave rise to this matter.

During its meeting on September 6, 2002, the Board conducted a hearing regarding the ACL Complaints. At the close of the hearing, the Board voted to leave the record open in order to allow submission of additional evidence and established a briefing schedule.

IV. CHRONOLOGY OF WASTE DISCHARGE PROHIBITIONS SHOWS THAT THE SUBJECT DISPOSAL SYSTEMS WERE "GRANDFATHERED."

The staff report prepared for the September 6, 2002 hearing in this matter correctly states that the waste discharge prohibition applicable to subsurface leaching percolation systems in Big Bear Valley, including the Baldwin Lake watershed, was originally adopted in 1973. However, Staff Report failed to acknowledge the modifications discussed below, which alter the prohibitions and change their effective date.

By way of Resolution No. 77-87, the Santa Ana River Basin Plan was amended to change the effective date of the Big Bear Valley prohibition to July 1, 1980. (See Resolution 77-87 attached hereto as Exhibit A.)

In September 1981, the Board again adopted revised criteria for exemptions from the Big Bear Valley Waste Discharge Prohibition. (See Minutes of Board Meeting on September 25, 1981 and Resolution No. 81-206, which are attached hereto collectively as Exhibit B.) As both the minutes and Resolution 81-206 indicate, the Board determined, among other things, that discharges exempted prior to July 1, 1980 could not be eliminated without causing undue hardship.

The Board's September 1981 Staff Report cited the significant cost hardship and the potential for lawsuits from denial of rights that would arise if the Board attempted to enforce rather than exempt existing and properly functioning septic systems more than 100 feet from Baldwin Lake. On page two of the Report, the staff states:

> It is important to note that exemptions which allow new or continued discharges from septic tank systems are to be granted under strict controls exercised by the County. Existing septic tank systems must be inspected and certified for conformance and proper operation initially and every two years thereafter by qualified, County-approved inspectors.

On page 3 of the Report, the staff provided its reasoning for modifying the exemption criteria as follows:

> Enforcing the prohibition would mean eliminating the discharges from all remaining individual systems. Holding tanks or connection to the sewer would be the only alternatives available to individual property owners and USFS lessees. *This would certainly result in widespread hardship, and would probably invite a great many lawsuits.*

Resolution 81-206 expressly stated that "the previous exemption criteria for the Big Bear Valley Prohibition Area are hereby rescinded." Accordingly, it is clear that the discharge prohibitions did not become effective until Resolution 81-206 was adopted on September 25, 1981. It is apparent therefore, that the Taylor and Justice waste disposal system were in place before the prohibition was effective.

V. CONTROLLING EVIDENCE SHOWS THAT THE CEASE AND DESIST ORDER AND, THEREFORE, ASSESSMENT OF ADMINISTRATIVE CIVIL LIABILITY ARE IMPROPER.

The evidence presented on behalf of Mr. Justice and Mr. Taylor at the September 6, 2002 hearing established the following points:

A. No direct evidence of a discharge of waste to the waters of the State:

- There is no groundwater within 10 feet below the ground of the leach fields. (Jerry Horne Letter to Board Chair, dated 9/6/02 ["Horne 9/6 Letter."")

- An aquatard at least 50 feet deep exists below the properties. (Horne 9/6 Letter)

- There is no evidence of contamination from the septic systems. (Horne 9/6 Letter)

- The septic systems have been properly maintained and have functioned without any problems for over twenty years. (Justice and Taylor 9/6 Letters)

B. Excessive Cost to connect to public sewer.

- It would cost between $50,000.00 and $100,000.00 for each of the property owners to establish a lateral hook-up to the BBCCSD sewer system. (Justice and Taylor 9/6 Letters)

- It would cost approximately $80,000.00 for a bonded contractor to construct a sewer main to which lateral hook-up would connect. (Exhibit A-5 Justice Letter).

C. Connection to the public sewer poses greater environmental risk than the status quo.

- The BBCCSD sewer system has nearly a 50% failure rate for the sewer system zone in which the Justice and Taylor properties are located. (Exhibit A-8 Justice Letter)

D. Improper extrapolation of top soil saturation in one location to infer waste discharge violation at a remote location.

- With regard to the hydrologic study conducted by Donn C. Schwartzkopf at the request of Mark Adelson, Mr. Horne stated:

> "I did the initial hydrogeology study several months ago or a year or so ago, and I was aware of that study. I mentioned it briefly, but perhaps did a disservice to the clients, because I discredited it so thoroughly because it seemed to be such a trivial study. In my experience, *you can't determine groundwater with a post-hole digger*. You know, what he was looking for as groundwater is not the groundwater table. He found water. But the groundwater table in that area is 50 or 60 feet below the land surface. *He found water because he was digging holes next to a creek, and it is just saturated for some short distance.*
>
> I didn't discredit that study in my earlier remarks, because *I didn't think anybody else would take those findings to be realistic for an aerially-extensive land surface*. It doesn't extend anywhere." (Reporter's Transcript p. 66:9-67:1, emphasis added.)

- The Schwatzkopf study was conducted on a rainy day following weeks of heavy rain during the 1998 El Nino year. (Justice Letter dated)

E. Type of vegetation belies the aerial extent of saturated soils saturated soils extrapolated from Schwarzkopf study.

- In discussing possible environmental indicators of the groundwater level and refuting testimony by Bill Norton, Mr. Horne noted:

> "Plants are excellent indicators of the level of groundwater. There's a group of plants called phreatophytes that have to have their roots in groundwater. If you have water within ten feet of the surface, you almost always have phreatophytes. The plants that were illustrated in those slides [Bill Norton's photographs] are xerophytes. They are drought-resistant desert plants. They don't tolerate their roots in saturated soil." (Reporter's Transcript p. 68:17-25, emphasis added.)

F. Temporary surface water, and associated soil saturation has no effect on groundwater.

- As to surface water, Mr. Horne asserted:

> "Water running across the surface temporarily in a given rainstorm has no impact whatsoever on a leach field" (Reporter's Transcript 74:2-4.)

G. Aquatard separates leach fields from groundwater table.

- Mr. Horne concluded his testimony by responding to a question regarding the chances of any groundwater ever going up to a depth where the leach fields are located as follows:

> "Virtually, no likelihood. And, conversely, there is virtually no likelihood that the water from their leach field will reach this aquifer." (Reporter's Transcript p. 68, lines 10-12.)

H. Additional evidence submitted herewith establishes the Cease and Desist Order and, therefore, the assessment of Administrative Civil Liability are not based upon substantial evidence.

In accordance with the Board decision to allow the submission of additional evidence, attached hereto as Exhibit C is a letter to the Board Chair from Mr. Horne, dated 9/20/02 [Horne 9/20 Letter] wherein he explains that the Schwartzkopf study could not be a valid indicator of saturated soil aerially extending under the Justice and Taylor leach fields because if that were the case, their septic systems would have backed-up.

The Schwartzkopf study was commissioned by staff to assess groundwater levels in the area of the Justice and Taylor properties. During the September 6, 2002 hearing, the Executive Director of the Board, Gerard Thibeault (the same individual who signed the Complaint) testified about the groundwater conditions in the area around the Justice and Taylor properties based on the findings of the Schwartzkopf study. In accordance with the Board's decision to hold the record "open" and to allow the submission of additional evidence, attached hereto as Exhibit C is a letter from Mr. Horne dated September 20, 2002 wherein he refutes Mr. Thibeault's testimony. The salient points of the letter are as follows:

- In response to Mr. Thibeault's statement that ". . . perched water is still ground water" (Reporter's Transcript 81:9.) Mr. Horne explains that it is highly unlikely that the perched water found in the shallow test holes bored by Schwartzkopf will in any way impact the operation of the septic systems on the Justice and Taylor properties. (Jerry Horne Letter dated 9/20/02, attached as Exhibit C [Horne 9/20 letter])

- Mr. Horne addresses Mr. Thibeault's contention that the water identified in Schwartzkopf's report is "regional" (Reporter's Transcript 82:12) by explaining there is no evidence to support the conclusion in Schwartzkopf's Report that the water identified in the shallow borings is indicative of the conditions on the Justice and Taylor properties. According to Mr. Horne, "In the absence of observations and in light of the climate, soil type, and proximity to the

ditch, it is not geologically prudent to extrapolate a conclusion far beyond the scope of observation." (Horne 9/20 Letter)

- Mr. Horne refutes Mr. Thibeault's argument that "if there is mottling within five feet of that surface, it's the highest historical level of water" (Reporter's Transcript 83:22-24) by noting, "Mottling in soils is not an indicator of the level of the ground water, past, present, permanent, or perched." (Horne 9/20 Letter)

- Finally, Mr. Horne states: "NO ground water, as it is normally defined, was found within 31½ feet of the land surface under the leach field. Chemical and biological analysis of the soil samples conducted by a California approved Laboratory did NOT indicate any adverse impact of the soil by the operation of septic system and leach field." (Horne 9/20 Letter)

VI. ARGUMENT

A. CIVIL LIABILITY CANNOT BE IMPOSED BECAUSE THE CEASE AND DESIST ORDER UPON WHICH THE COMPLAINT IS BASED WAS IMPROPER

The Complaint seeks to impose civil liability on the ground that Mr. Justice and Mr. Taylor violated the Cease and Desist Order. The Cease and Desist Order sets forth several methods by which they could comply with the Order, including, submitting a report by a qualified engineer demonstrating that the exemption criteria has been met (i.e. a report that assesses the impacts of discharges and presents geologic and hydrologic evidence showing that the discharge of waste will not affect water quality); qualify for an exemption through the use of an alternative on-site waste disposal system; cease discharges by the use of holding tanks (which the Board expressly stated was not an acceptable long-term alternative); or permanently connect to a sewer system.

Pursuant to Water Code section 13350, in order to impose civil liability based on a violation of a cease and desist order, it must be shown that such violation was intentional or negligent. (Water Code § 13350(a).) A necessary predicate to the imposition of administrative civil liability is a proper cease and desist order. As demonstrated below, as well as in the concurrently filed Petition to Revoke Cease and Desist Order No. 00-83, in the present situation, the cease and desist order was improper since both Mr. Justice and Mr. Taylor were exempt from the discharge prohibitions. Therefore, neither Mr. Justice nor Mr. Taylor intentionally or negligently violated such Order and administrative civil liability cannot be imposed.

1. Board's Authority to Issue Cease and Desist Orders

The Board has the authority to issue a cease and desist order only when it finds that a discharge of waste is taking place or threatening to take place in violation of waste discharge requirements or prohibitions. (Water Code § 13301.) In short, the Board must either show that there has been a discharge or that a discharge is threatened. A cease and desist order must be supported by substantial evidence in the record that the discharge will result in "violation of water quality objectives, will impair present or future beneficial uses of water, will cause pollution, nuisance, or contamination, or will unreasonably degrade the quality of any waters of the state." (Water Code § 13280.)

Pursuant to Water Code section 13281, the Board was mandated to consider *all relevant evidence* including failure rates of the existing disposal system, evidence of any existing, prior or potential contamination and the factors listed under Water Code section 13241 prior to issuing the Cease and Desist Order. The section 13241 factors include: past, present and probable future beneficial uses of water; environmental characteristics of the hydrographic unit under consideration; water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality in the area; and, perhaps most important, economic considerations.

The Board failed to consider these factors as required by law. Instead, it considered only Mr. Schwarzkopf's limited report of hydrologic conditions in an area hundreds of feet away from the septic systems, at a location adjacent to a drainage ditch where saturated top soil could be expected during a wet weather period such as the winter and spring of 1998. According to Mr. Horne's testimony, reliance on such a report is misplaced. As explained in greater detail below, the Cease and Desist Order should never have been issued.

2. The Justice and Taylor Septic Systems Were Constructed and Approved by the County Prior to 1980 Pursuant to Valid Building Permits Issued by the County

The State of California, through the Board, is estopped from claiming that John Justice and Ron Taylor did not receive exemptions from the waste discharge prohibition. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it. (Evid. Code, § 623; see *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488.) Estoppel may be applied to prevent a public agency from denying the validity of a building permit issued in violation of a zoning ordinance if revoking the permit would result in an injustice to the property owner that outweighs any effect that granting the permit would have upon public interest or policy. (*Anderson v. City of La Mesa* (1981) 118 Cal.App. 657, 661.) Estoppel can be applied in an administrative proceeding. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 406.)

In *Anderson*, the plaintiff built her house in conformity with a building permit issued to her by the city requiring the home to be set back at least five feet from the side lot lines. The five feet setback was in accordance with the city's standard zoning ordinances. The city had inspected the house six times during construction, but after completion, it refused an occupancy permit on the ground a specific plan ordinance required the house to be set back at least ten feet from the lot lines. The court held that the city was estopped from enforcing the specific plan ordinance because its enforcement would cost the plaintiff more than $6,000.00 and "create no special problem for the area for adjacent landowners."

The predecessors-in-interest of John Justice and Ron Taylor obtained valid building permits and approval of their septic systems from the County of San Bernardino before the Board's prohibition came into effect in July of 1980. Board exemptions at that time, and thereafter, were processed by the County. All that the County required was the submission of an acceptable soils report prior to issuance of a building permit. The Board must presume that the County received an acceptable soils report prior to its issuance of the building permit. (See Govt.Code § 664 ["It is presumed official duty has been regularly performed"].)

As noted above, in September 1981 (which was after the septic tank systems and residences of John Justice and Ron Taylor were built) the Board changed its criteria to deem as exempted any existing septic systems that did not fail County inspections. Thereafter, unless John Justice and Ron Taylor and their predecessors-in-interest received notice from the County that their septic system had failed, they could rely upon the fact that as of 1981, the Board had granted an exemption. Mr. Justice and Mr. Taylor purchased their property relying upon the valid permitting for the septic systems. The County never found that the Justice or Taylor septic tank systems failed the County criteria.

The Board's September 1981 staff report cited the significant cost hardship and the potential for lawsuits from denial of rights that would arise if the Board attempted to enforce rather than exempt existing and properly functioning septic systems more than 100 feet from Baldwin Lake. Thus, the Board recognized in September 1981 that sufficient injustice would occur to estopp the Board from revoking existing and properly functioning septic systems allowed by valid building permits. As testimony by Mr. Justice and Mr. Taylor establishes, they would each suffer a hardship exceeding $50,000.00. In the *Anderson* case, a hardship of $6,000.00 was held sufficient to outweigh public policy concerns.

The State of California should not be allowed to sit back and do nothing for 20 plus years and, thereafter, effectively revoke the valid building permits of Mr. Justice and Mr. Taylor by ordering them to cease their use of an essential service that cannot be obtained otherwise without significant cost. (See *Sawyer v. City of San Diego* (1956) 138 Cal.App.2d 652, 662-663 [estoppel applied to prevent city from discontinuing water service after the city was under contract for 20 years to supply a subdivision with water].)

3. Substantial Evidence Shows that the Justice and Taylor Septic Systems Meet and Have Always Met the Requirements for an Exemption

As noted above, the Board prior to 1980 did not enforce the waste discharge prohibitions and after September 1981 the Board granted exemptions to any existing and properly functioning septic tank system unless the County provided evidence that the septic tank system was not working. Since there is no evidence that the John Justice and Ron Taylor systems have not been or are not now working properly, it must be presumed that Mr. Justice and Mr. Taylor are operating within the Board's exemption policy. (Evid. Code, § 664.) The Board staff failed to mention the Board's prior exemption criteria to the Board at the hearing on Cease and Desist Order No. 00-83. Thus, the Board, in issuing Order No. 00-83 failed to apply the applicable presumption that an exemption had been granted.

Additionally, according to the testimony of Mr. Horne, historic scientific data shows that the Justice and Taylor septic systems are located in an aquatard that prevents groundwater from rising higher than 50 feet below the ground surface.

According to their testimony, the Justice and Taylor septic systems have worked properly for twenty years without any incidents. The proper functioning of these systems indicates that soil conditions and percolation rates are proper at their current locations. Moreover, properly conducted soil bacteria testing has demonstrated the absence of indicator (fecal coliform) bacteria that would be present if the septic tank systems were not working properly.

B. CIVIL LIABILITY CANNOT BE IMPOSED BECAUSE JUSTICE AND TAYLOR HAVE BEEN DENIED PROCEDURAL DUE PROCESS

Administrative agencies are obligated to act within constitutionally mandated limits in administering the law. (See *Jaffe v. Unemployment Ins. Bd.* (1984) 156 Cal.App.3d 719, 723.) Although a formal court trial is not necessary in order to satisfy constitutional procedural due process requirements, an adjudicative (quasi-judicial) proceeding before an administrative board must meet the basic requirements. (See *Anderson Nat. Bank v. Luckett* (1944) 321 U.S. 233; *Blinder, Robinson & Co. v. Tom* (1986) 181 Cal.App.3d 283, 289.) Proceedings which wholly deny notice or hearing or provide inadequate methods, are lacking in due process.

The SWRCB has adopted procedures that govern adjudicative proceedings both before it and all regional boards. (20 Cal. Code of Regs. § 648.) Each party to an adjudicative proceeding has the right to do the following: call and examine witnesses; introduce exhibits; cross examine opposing witnesses; impeach witnesses; and rebut the evidence against him or her. (Govt. Code § 11513(b).) As shown below, the September 6, 2002 hearing was lacking in procedural due process.

1. Procedural Due Process Requirements Were Violated Because Justice and Taylor Were Denied the Right to Cross-Examine Witnesses

At the hearing, Board staff was allowed to present documentary evidence, put on witnesses and cross-examine witnesses. The representative for Mr. Justice and Mr. Taylor was not afforded the opportunity to fully examine the witness presented by the Board staff. Specifically, he was not permitted to adequately cross-examine Bill Norton. (See Reporter's Transcript p. 20-39.)

2. References to Unspecified and Unsubstantiated "Anecdotal Evidence" in the Staff Report and in Testimony Presented by Staff at the Hearing Are Improper and Must be Disregarded by the Board

Mr. Justice and Mr. Taylor hereby object to the following statements made in the Staff Report and by Mr. Norton at the September 6, 2002 hearing, on the ground that they are improper, inadmissible hearsay:

> "We have information from San Bernardino County Environmental Health that the subsurface disposal systems are approximately five feet in depth, below ground surface, which means that when the groundwater of the water in the area reaches the levels that were found in the 1998 report, the leach lines of the subsurface disposal systems are under water. . . We also have anecdotal information from time to time about odors, marshy conditions, high groundwater elevation in wells along the road, and even subsurface disposal system failures. . ." (Reporter's Transcript 11:6-20.)

This statement is not only hearsay, but it is ***un-attributed, non-specific, unsubstantiated and prejudicial*** hearsay that hardly rises to the level of a rumor ***and should not be dignified as evidence.*** Hearsay evidence "is in its very nature and by common experience a weak and unreliable kind of evidence." (Witkin, California Evidence (3rd Ed. 1986) § 558.) The primary reasons for excluding hearsay evidence are: (1) the statements are not made under oath; (2) the adverse party has no opportunity to cross-examine the person who made them; and (3) the trier of fact cannot observe the demeanor of the declarant while he is making the statement. (See *Englebretson v. Industrial Acc.*

Com. (1915) 170 Cal. 793, 798.) The statement should be stricken from the record and disregarded by the Board.

Hearsay evidence can be used in an adjudicative hearing to supplement or explain other evidence. (Govt. Code § 11513(c).) However, if a timely objection is made, hearsay evidence shall not be sufficient itself to support a finding unless it would be admissible in civil actions. (Govt. Code § 11513(d).) A hearsay objection is considered timely if made before the submission of the case or on reconsideration. (Id.)

The Board should not consider any statements containing unspecified and unsubstantiated "anecdotal evidence", nor improper hearsay as they are not sufficient to support a finding and would not be admissible in any court.

C. CIVIL LIABILITY CANNOT BE IMPOSED BECAUSE THE FACTORS TO BE CONSIDERED BEFORE MAKING SUCH A DETERMINATION DO NOT WARRANT SUCH A PENALTY

California Water Code section 13327 requires the Board to consider numerous factors before imposing civil liability. Of these factors, the following are relevant to this proceeding:

1. The nature, circumstance, extent and gravity of the violation;

2. The ability to pay the proposed assessment; and

3. The effect on ability to remain in business.

An analysis of the scientific evidence presented by Jerry Horne shows that no leaching or percolation of waste from the systems has, or will in the future, result in a pollution or nuisance or otherwise affect water quality. (Horne 9/6 Letter) Therefore, the nature, extent and gravity of the alleged violation are inconsequential.

The Staff Report states that Mr. Justice and Mr. Taylor can afford to comply with the Cease and Desist order based on the asking price for several homes currently for sale on Shay Road. (Staff Report p. 8.) This assertion is inappropriate on several levels. To begin, no reliable evidence has been offered to prove this fact. Second, well-settled California law establishes that an asking price does not determine the value of real property. Third, the value of other homes, which may vary greatly from those of Mr. Justice and Mr. Taylor, are irrelevant. Finally, despite the staffs' grossly understated numbers, the actual overall cost to connect to the BBCCSD sewer system could range from $80,000 to $170,000 for each residence for hard construction cost alone, not counting any sewer connection fees assessed by the sewering agency. (See Justice and Taylor Letters) This is an enormous sum of money regardless of what the properties may be worth.

In addition, Mr. Justice and Mr. Taylor both conduct business on their property. (See Justice and Taylor 9/6 Letters) If they were required to hook-up to the BBCCSD system, Shay Road would be under construction and impassible for motor vehicle traffic for several months. This would cause significant business interruption losses for Mr. Justice and Mr. Taylor. (See Justice and Taylor 9/6 Letters) The staff's failure to consider this factor was in error.

In light of the three factors discussed above, even assuming the Cease and Desist Order was proper (which Mr. Justice and Mr. Taylor vehemently dispute), there is no basis to impose of civil liability as proposed in the Complaint and Staff Report.

VII. CONCLUSION

Based on the foregoing authority, Mr. Justice and Mr. Taylor respectfully request that the Board dismiss the Complaint in its entirety and impose no administrative civil liability.

DATED: September 19, 2002 McCORMICK, KIDMAN & BEHRENS

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REPLY BRIEF

I. INTRODUCTION.

The Board cannot affirm Administrative Civil Liability Complaint Nos. RB8-2002-0064 and 0065 as requested by the Enforcement Division. The complaints are based on void and illegal Cease and Desist Order No. 00-83. The Order is void and illegal because it imposes new liability for Defendants' septic systems that were installed lawfully before January 1, 1981. (See Water Code, § 13304(f).) Additionally, the Enforcement Division failed to present evidence that Defendants discharged or will discharge to waters of the State in violation of the Order. (See Water Code, § 13308(a).) Finally, Defendants' presented un-contradicted evidence that it would be unjust to impose administrative civil liability because connection to the sewer system would cause Defendants significant economic detriment. (See Water Code, § 13327.)

II. SCHEDULE

This Reply Brief concludes the briefing schedule for this matter. According to the schedule, Defendants filed their Closing Brief two weeks after the Board's September 6, 2002 hearing, on September 20, 2002. The Enforcement Division then filed its *Response Brief* two weeks after the Closing Brief, on October 4, 2002. The *Response Brief* was submitted in the form of a staff report dated December 3, 2002. Defendants now file their Reply Brief two weeks after the *Response Brief*, on October 18, 2002. The submission of evidence and briefs has now concluded and, apparently, the Board has continued the matter to December 3, 2002.

III. CEASE AND DESIST ORDER 00-83 IS ILLEGAL AND VOID BECAUSE IT IMPOSES NEW LIABILITY.

The Board must disregard Cease and Desist Order No. 00-83 because it is void and illegal. An administrative agency order that exceeds the agency's authority is void and cannot be enforced. (See *California Adjustment Co. v. Atchison, T. & S.F. Ry. Co.* (1918) 179 Cal. 140, 149.)

Cease and Desist Order No. 00-83 exceeds the Board's authority. Water Code Section 13304 contains the Board's authority for cease and desist orders. Water Code Section 13304(f) provides:

> "This section does not impose any new liability for acts occurring before January 1, 1981, if the acts were not in violation of existing laws or regulations at the time they occurred."

The *Response Brief* concedes, at page 2 thereof, that Defendants' septic systems were installed in 1975 and 1979. The *Response Brief* also concedes therein that the effective date for the Bear Valley waste discharge prohibition was extended to July 1, 1980. Therefore, at the time Defendants installed their septic systems, they were not in violation of the prohibition. The Board cannot, by means of Cease and Desist Order No. 00-83, impose new liability for Defendants' previously lawful acts.

IV. NO EVIDENCE SHOWS THAT DEFENDANTS DISCHARGED IN VIOLATION OF CEASE AND DESIST ORDER NO. 00-83.

The Board must have proof that Defendants have discharged or threaten to discharge so as to affect the quality of the waters of the State in order to assess civil liability. (See Water Code, §§ 13304(a), 13308(a), 13350(b)(2) & 13260(a)(1).) Page 4 of the *Response Brief* contains only a "contention" that perched water "is continuous" and "creates a regional perched condition north and south of Shay Road."

The Board cannot rely on a "contention." Statements by those not sworn as witnesses are not evidence that can be relied upon in an administrative proceeding. (Evidence Code, § 140; See *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1426 [evidence in administrative hearing must be in the form of testimony or physical objects, and testimony must be statements made under oath].) Dr. Horne testified that the aquatard did <u>not</u> create a <u>regional</u> perched condition. (September 6, 2002 Letter, pp. 2-3.)

No evidence was presented that the <u>isolated</u> perched groundwater observed by Donn Schwartzkopf has any beneficial use. The purpose of water quality objectives is to ensure the "reasonable protection of beneficial uses" of the waters of the State. (Water Code, § 13241.) The Legislature recognized that it is possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. (Id.)

V. ENFORCEMENT OF THE CEASE AND DESIST ORDER WOULD BE UNJUST.

Private individual Defendants should not have to bear immediate and disproportionate costs to construct a sewer main that would only benefit the public sewer agency, even if Defendants had historically discharged to high groundwater. Additionally, it would be unjust to impose liability on Defendants for unproven high groundwater infiltration while the Board does not impose any obligation on the public sewer system to prevent proven high groundwater infiltration. The Board must take into consideration the nature, circumstance, extent, and gravity of the alleged violation of Cease and Desist Order No. 00-83, including any prior history of violations, economic benefit or savings resulting to Defendants from the alleged violation, and other matters as justice may require. (Water Code, § 13327.)

A. DEFENDANTS PRESENTED UN-CONTRADICTED EVIDENCE OF A SIGNIFICANT ECONOMIC BENEFIT FROM CONTINUING TO OPERATE THEIR SEPTIC SYSTEMS

Defendants, presented the following evidence that continued operation of their septic systems confers a significant economic benefit over proposed connection to the sewer system:

- "It would cost between $50,000 and $100,000 for each of the property owners to establish a lateral hook-up to the BBCCSD sewer system."
- "It would cost approximately $80,000 for a bonded contractor to construct a sewer main to which lateral hook-up would connect."

The *Response Brief* concedes that contrary evidence was not presented. As to the sewer main cost, page 3 of the *Response Brief* states:

"It is possible that the final cost would be $80,000 . . .."

As to the sewer lateral cost, page 3 of the *Response Brief* states:

"We do not have enough information to categorically refute this claim . . .."

B. DEFENDANTS PRESENTED UN-CONTRADICTED EVIDENCE OF UNJUST APPLICATION OF THE PROHIBITION

Defendants presented the following evidence that the prohibition is being applied unjustly against them:

- "The BBCCSD sewer system has nearly a 50% failure rate for the sewer system zone in which the Justice and Taylor properties are located."

As to the BBCCSD sewer system failure rate, page 4 of the *Response Brief* concedes:

> "The estimated defect percentage of 23% from physical inspections, and up to 44% from flow isolations, represents the maximum defect rate, based on infiltration into a pipe from high groundwater." [underlining added]

Page 4 of the *Response Brief* allows the public sewer agency several years to obtain money and to conduct repairs to prevent high groundwater infiltration.

VI. THE BOARD MUST EXCLUDE HEARSAY STATEMENTS.

The *Response Brief* relies on anecdotal hearsay statements. If timely objection is made, hearsay statements cannot support a finding unless the statements would be admissible in civil actions. (Govt. Code § 11513(d).) A hearsay objection is timely if made before the submission of the case. (Id.) Defendants object to the following hearsay statements contained in the *Response Brief*:

- "Based on conversations by staff with the Big Bear Community Services District, and others, we believe that it would cost far below $50,000 for laterals . . . our sources stated that the work could be done for between $5,000 and $6,000." (Page 3.)

- "In a conversation that Board staff had with Mr. Gary Cecil of Big Bear Community Services district on October 3, 2002, the defect rate of sewer pipes in the vicinity of Shay Road was discussed'. . .. The amount of sewage waste leaving the pipes is not calculated separately, and therefore the defect rate affecting exfiltration could be much lower than the percentages listed above. Many of these holes self seal from grease in the lines which eventually clogs the hole, and prevents exfiltration from it. The District is conducting ongoing repairs to these problems, and over the next few years, the defect rate should come down steadily, especially in areas such as Basin 13 where Shay Road is located."

- "In addition, in discussions with Mr. Donn Schwartzkopf by Board staff, he states that none of his borings were done near any surface water. He stated that the closest boring to surface water was taken on the west end of Shay Road, about 25 feet from a small amount of standing (not flowing) water, which was on the north side of the road next to the Gilchrist property, in a culvert. The "ditch" on the south side of the road was dry at the time, and the small creek bed on the west side of Gilchrist's house was also dry, except for the small pool of standing water mentioned above."

VII. CONCLUSION

Based on the foregoing authority, and upon the evidence in this case, Defendants John Justice and Ron Taylor respectfully request that the Board revoke Cease and Desist Order 00-83, dismiss the Complaints in their entirety, and impose no administrative civil liability.

DATED: October 18, 2002 McCORMICK, KIDMAN & BEHRENS

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